No. Dec. 19.

Brief of Fay for Appellant

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Feb. 4, 1898.

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SARAH A. OAKES

vs.

THE UNITED STATES.

No. 211.

BRIEF OF APPELLANT.

JOHN C. FAY,
Attorney for Appellant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1898.

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Supreme Court of the United States.

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SARAH A. OAKES,
APPELLANT,
v.
THE UNITED STATES.
No. 211.

BRIEF OF APPELLANT.

STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing the petition of appellant in an action prosecuted under the act of July 28, 1892 (27 Stat. L. 320), which reads as follows:

> "An Act to confer jurisdiction on the Court of Claims to hear and determine the claim of the heir of Hugh Worthington, for his interest in the steamer *Eastport*.
>
> Whereas it is claimed the steamer *Eastport* was taken by the United States anno Domini eighteen hundred and sixty-two, and converted into a gun-boat; and
>
> Whereas it is claimed at the time of such taking,

one Hugh Worthington, then of Metropolis, Massac County, Illinois, but since deceased, was the owner of three-fifths interest in said steamer, and no compensation has been paid to said Hugh Worthington or his heirs; and

Whereas his daughter, Mrs. Sarah A. Oakes, of Metropolis, Illinois, claims that Hugh Worthington was a loyal citizen, that she is his only heir-at-law, and is justly entitled to receive from the United States compensation for the value of her father's interest in said steamer: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims to hear and determine what are the just rights in law of the said Sarah A. Oakes as heir of Hugh Worthington, deceased, and that from any judgment so entered by said Court of Claims, either party may appeal to the Supreme Court of the United States for compensation for the value of said Worthington's interest in said steamer *Eastport*. That upon proper petition being presented by said Sarah A. Oakes, her heirs, executors, or administrators to said court, said court is authorized and directed to inquire into the merits of said claim, and if on a full hearing the court shall find that said claim is just, the court shall enter judgment in favor of the claimant and against the United States for whatever sum shall be found to be due.

SEC. 2. That in case judgment shall be rendered against the United States, the Secretary of the Treasury shall be, and he is hereby, authorized and directed to pay the claimant, her heirs, executors, or administrators, whatever sum shall be adjudged by the court to be due, out of any money in the Treasury not otherwise appropriated."

At the outbreak of the civil war the steamer *Eastport*, of Paducah, Kentucky, engaged in trade on the Cumber-

land, Ohio, and Mississippi rivers, was the property of Hugh Worthington, Mrs. A. O. Woolfolk, and Charles W. Harrison, in the proportion of three-fifths to Worthington, and one-fifth each to the other two owners. Early in the war of the rebellion the captain of said steamer, without the consent or knowledge of the owners, took the vessel from Paducah, the port of her enrollment, to a place on the Tennessee river, within the lines of the Confederate forces, where she fell into the hands of the Confederate government, through means not disclosed by the record, which government proceeded to convert her into a gunboat at Cerro Gordo, on the Tennessee river, a few miles above Fort Henry. While the work was thus in progress, but before the vessel had been used in any hostile demomstration against the United States, "the naval forces on the Western waters, commanded by Commodore A. H. Foote, U. S. N.," captured the vessel and took her to Mound City, Illinois, where she was reconstructed and made a gunboat, and thereafter used as such by the United States until she was blown up and sunk by her commander, in April, 1864, near Grand Ecore, Louisiana, to prevent her capture by the enemy.

Soon after her capture certain libel proceedings were had against her in the District Court of the United States for the Southern District of Illinois, under the Confiscation Act of August 6, 1861 (12 Stat. L. 219), wherein a decree in condemnation forfeiting the vessel to the United States was rendered, and the vessel ordered sold at public auction, which was done by the marshal for said district, and the vessel bid in in the name of the United States. These proceedings were had without an order from the President, and without any notice to the said Hugh Worthington. Prior to and during the war Hugh Worthington was a citizen and resident of Metropolis,

Illinois, about ten miles above Paducah, Kentucky. He was loyal to the United States throughout the war, and gave no aid or comfort to the rebellion.

Scope of Enabling Act.

It was contended by the counsel for the Government, and the contention was sustained in the court below, that the enabling act in this case has no other effect on the jurisdiction of the Court of Claims than to remove the bar of the Statute of Limitations, and unless claimant had a cause of action at the time of the appropriation of his vessel by the United States to their use, none is given him by this act. The jurisdiction conferred upon the Court of Claims by this act is stated in two ways. At the beginning of the first section jurisdiction is conferred upon the court "to hear and determine what are the just rights in law of the said Sarah A. Oakes," etc., and at the end of the same section it is further conferred in this language: "If on a full hearing the court shall find that said claim is just, the court shall enter judgment in favor of the claimant and against the United States for whatever sum is found to be due." In the Cummings case (130 U. S. R. 452) the claimants were "permitted to sue in the Court of Claims, which court shall pass upon the law and facts as to the liability of the United States," and the court below held that the jurisdiction conferred by the enabling act in this case was the same as that conferred by the act in the Cummings case. The Cummings case was a claim for damages resulting from the alleged wrongful acts of an officer of the United States—a collector of internal revenue—and this court held that unless his wrongful acts in themselves created a cause of action, none existed, as no cause of action was created by the

enabling act. I shall, however, attempt to show that the jurisdiction conferred in the case at bar is much broader and more liberal than a mere authority to "pass upon the law and facts as to the liability," etc. The language of the act conferring jurisdiction in the case at bar, as stated by Judge Peele in delivering the opinion of the court below, is not free from ambiguity. As I have shown above, it is attempted to be stated in two ways, in each of which, however, the jurisdiction depends upon whether or not the claim is "just." There is no better settled rule of law than that remedial statutes should be construed most liberally in favor of the persons to whom relief purports to be afforded and so as to render that relief effectual.

In Smith *against* Townsend (148 U. S. 490) this court says:

> "It is well settled that where the language of a statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy."

In Lyde *v.* Bernard (1 M. & W. 113), Parke, B., said:

> "I admit that words may be construed in a sense different from their ordinary one when the context requires it, or when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual. For we must always construe the act so as to suppress the mischief and advance the remedy."

In Heydenfelt *v.* Daney Gold Min. Co. (93 U. S. 634) Mr. Justice Miller, speaking for this court, says:

> "'It is better always,' says Judge Sharswood, 'to adhere to a plain common-sense interpretation of the

> words of a statute than to apply to them refined and technical rules of grammatical construction. Gyger's Estate, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act, taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it and the causes which induced its enactment.' "

One of the guides in the construction of ambiguous statutes is the title thereof. In U. S. *v.* Fisher (2nd Cranch., 386) Chief Justice Marshal says:

> "Where the mind labors to discover the design of the legislature it seizes everything from which aid can be derived, and in such cases the title claims a degree of notice and will have its due share of consideration."

The title to the enabling act in this case is as follows:

> "An act to confer jurisdiction on the Court of Claims to hear and determine the claim of the heir of Hugh Worthington for his interest in the steamer *Eastport*."

This title, taken in connection with the authority to the court in the body of the act to enter judgment in favor of the claimant if they shall "find that said claim is just," and the duty of the court to give a liberal construction to a remedial statute seems to me to leave no doubt that the jurisdiction intended by the legislature to be conferred upon the court was to ascertain if the claimant was the heir at law of Hugh Worthington, if Hugh Worthington was a loyal citizen of the United States and the owner of three-

fifths of the steamer *Eastport*, if said steamer was taken and appropriated to the use of the United States, and the value thereof, and if the court will give to the word "just" in the act its ordinary, every-day interpretation rather than its technical interpretation in law, there will be no difficulty in arriving at this conclusion.

Land or Marine Capture.

Relying upon their contention that the enabling act in this case affected the jurisdiction of the court below in no other way than to remove the bar of the Statute of Limitations, the defendants contended, and the contention was sustained in the court below, that the steamer *Eastport* was captured by the land forces of the United States, and that by the mere act of capture the title became vested, by the law of war, in the captors; while it was contended by the claimant that the capture was a marine capture, and under the act of March 3, 1800 (2 Stat. L. 17), no title passed to the captors in the absence of a condemnation and sale in a court of admiralty. The facts found by the court below show that the capture was effected while the *Eastport* was tied up at Cerro Gordo Landing, on the Tennessee river, by the naval forces on the Western rivers commanded by Commodore A. H. Foote, U. S. N., *i. e.*, by detachments of men in small boats from the gunboats *Tyler*, *Lexington*, and *Conostoga*; that the naval forces on the Western waters were equipped partly with money appropriated by Congress to the Quartermaster's Department of the army, and partly by the Navy Department, but they were commanded by officers of the navy, who took their orders from and reported to the Navy Department (Finding V, page 8). These naval officers were not, as is stated in the opinion of the court below,

under the command of, or even a part of, the forces of the Army of the West. The letter of instructions under which Admiral Foote proceeded to take command of the Western flotilla is found in Finding V, page 7, in which he is ordered by the Secretary of the Navy to place himself

> "in communication with Major-General J. C. Fremont, U. S. army, who commands the Army of the West. You will co-operate fully and freely with him as to your movements. Requisitions must be made upon the War Department through General Fremont, and whatever the army cannot furnish the navy will endeavor to supply. The Western movement is of the greatest importance, and the Department assigns you to this duty, having full confidence in your zeal, fidelity, and judgment."

As is well known, the only reason why this flotilla was organized and equipped in the Quartermaster's Department of the army, rather than by the Navy Department, was because the Quartermaster's Department had an available appropriation for that work, and the Navy Department had none, so that until the act of July 16, 1862 (12 Stat. L. 567), making the appropriation for the support of this fleet to the Navy Department, the Government was compelled to theoretically consider the Western flotilla as a part of the Quartermaster's Department, although in fact it was as much a part of the navy of the United States then as it ever became afterwards. The character of a capture, whether it be a land or marine capture, must be determined solely from what agencies effected it and not from what department authorized it. This capture was made by vessels commanded by officers of the United States navy reporting to and receiving orders from the Secretary of the Navy, upon navigable

waters of the United States, and, therefore, had all the elements of a marine capture. Since the case of *The Genesee Chief* (12 How. U. S. 443) and Fretz *v.* Bull (*idem* 466) all inland waters of the United States capable of navigation have been held to be within the jurisdiction of courts of admiralty, and, for the purposes of this discussion, equivalent to the high seas. In the case of *The Propellor Commerce* (1 Black 574), which was a libel in admiralty for a marine tort growing out of a collision on the Hudson river, this court says:

> "Locality, by all the authorities, is the test, in cases of tort, by which to determine the question whether the wrongful act is one of admiralty cognizance; and if it appears, as in case of collision, depredations upon property, illegal disposition of ships, or seizures for breach of revenue laws, that it was committed on navigable waters within the admiralty or maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty." (See also *Ex parte* Boyer, 109 U. S. 629.)

The fact that this fleet of gunboats was theoretically a part of the Quartermaster's Department of the army can in no way affect or modify its character as a portion of the naval armament of the United States. In the original organization of our Government the navy and army were both under the control of the head of the War Department, who was not Secretary of the Army nor Secretary of the Navy, but was Secretary of War (1st Stat. L. 49). The army was no less the military establishment of the United States then than it is now, nor was the navy, from the mere fact that it was under the same control as the army, any less the naval establishment, nor was its character as the naval establishment changed by the act creat-

ing the Navy Department. (1st Stat. L. 553.) Under both Departments it was the navy of the United States, and equally the *Conostoga*, *Tyler*, and *Lexington*, when they captured the *Eastport* at Cerro Gordo Landing, although theoretically a part of the Quartermaster's Department, were in fact a part of the navy of the United States. It seems to me that no question of this would have arisen but for certain decisions which give too much significance to the change of the appropriation for the maintenance of this fleet from the Quartermaster's Department to the Navy Department. In the case of 269½ bales of cotton (1 Woolworth, 236) which seems to have largely controlled the court below, Justice Miller seems to have based his opinion that there were no naval forces on the Western waters, upon this fact, and this fact alone, for he says:

> "Indeed, we know that no naval force then existed on these waters. The gunboats were made a part of the navy by order of the Government on the 1st day of October [1862], several days after the capture."

and further:

> "In short, the entire statement is consistent with the fact that the vessels and crews were in the employment of the War Department, and were used merely as transports to carry the troops."

These gunboats that captured the steamer *Eastport*, so far as this record shows, were never used to transport troops, but on the contrary were designed and used, from the beginning, as fighting machines, and it is a matter of history that this fleet, before the arrival of any land forces, compelled the surrender of Fort Henry. That capture might have been, as the court below says the capture of the *Eastport* might have been, effected by land forces, but the

fact remains that they were both effected by naval forces, and naval forces alone.

Act of March 3, 1800.

So far, I have proceeded on the theory that the capture must be made by a vessel belonging to the *navy* of the United States before it can be held to be a maritime capture and subject to the provisions of the act of March 3, 1800 (2 Stat. L. 17), and this seems to have been the view of the case entertained by the counsel for the Government and the court below. The first section of that act, which is the only one applicable to this case, is as follows:

> "That when any vessel other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessel, acting under authority from the Government of the United States, shall appear to have before belonged to any person or persons, resident within or under the protection of the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government, or state, against which the United States have authorized, or shall authorize, defence or reprisals, such vessels or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, if retaken by a public vessel of the United States, one-eighth part, and if retaken by a private vessel of the United States, one-sixth part, of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war, before such capture or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration

thereof, shall be adjudged to pay for and in lieu of salvage one moiety of the true value of such vessel of war or privateer."

The steamer *Eastport* was a vessel belonging to a citizen resident within and under the protection of the United States, which had been taken by an enemy of the United States, but had not been used in any hostile demonstration against this Government. (Finding V, page 6.) At the time of its recapture it was upon navigable waters and therefore subject to be taken as prize and was so taken by a vessel acting under authority from the Government of the United States. *The General Cass*, Brown Adm. 334; *The Alabama*, 22 Fed. R. 449; *The City of Pittsburgh*, 45 Fed. R. 699; *The Eliza Ladd*, 3 Sawy. 519.

It seems to me that these facts completely make such a case as is contemplated by the first section of the act of 1800, and make it immaterial whether the vessel making the capture was a part of the United States navy or was acting under authority from the United States Government exercised through some other department thereof. At the time of the passage of the act of 1800 the United States had at least one other class of vessels besides those belonging to its navy, *i. e.*, revenue cutters (I Stat. L. 461–462), and I do not think there has been a day since the passage of that act that captures of this character made by revenue cutters would not have been held to be maritime prizes. If it be conceded that the *Conestoga*, *Tyler*, and *Lexington* were not a part of the navy of the United States, but were a part of the Quartermaster's Department of the army, they were at least vessels acting under authority from the United States Government, and the statute of March 3, 1800, is not intended to control captures made by the navy alone, but applies with equal

force to captures by vessels belonging to the War Department, the Customs Revenue Service, the Light-House Board, or any other branch of the Government requiring the service of vessels upon navigable waters. I therefore contend, whether the capture was made by a vessel belonging to the navy or a vessel belonging to the army, that in the absence of a condemnation and sale by a prize court, the Government, when it failed to return the recaptured steamer to its owner, a loyal citizen of the United States, as provided by the act of 1800, but appropriated it to public use, impliedly promised just compensation therefor, and claimant from that time had a cause of action distinct and separate from any created by the enabling act in this case.

CONDEMNATION.

It was contended in the court below that by the condemnation proceedings in the District Court for the Southern District of Illinois (Finding IX, page 9) under authority of the act of August 6, 1861 (12 Stat. L. 319), the claimant was lawfully divested of title to his portion of the steamer *Eastport*, and the title thereof vested in the United States. The absence of jurisdiction in that court is so apparent that I do not deem it necessary to do more than call the attention of the court to the fact that the proceedings were had without authority from the President of the United States as required by that act, and cite the court to Winchester's case (99 U. S. 372).

CONFEDERATE ARCHIVES.

The court below has found (Finding III, page 5) that the captured Confederate archives in the War Department show certain correspondence between officers and

officials of the Confederate States government tending to show that that government purchased the *Easport* from some one whose name the correspondence does not disclose. I respectfully submit that this finding should not have been made, since it is not a finding of the ultimate fact that the purchase was made. It is not even a finding that competent evidence was offered tending to establish that ultimate fact; but if it were true that such purchase was made, nothing in the record shows that it was made from Hugh Worthington, or with his consent. The record does show that the captain of the *Eastport*, against the consent and without the knowledge of the owner, took the vessel from Paducah, Ky., and ran her into the enemy's territory where she was taken (Find. III, p. 4). That act of the captain's was barratry or piracy, and in either event makes the recaptor, by the law of all civilized nations, bound to restore it (Wheat. Int. Law, sections 360–361). If she was not purchased from the captain but at a sale ordered by a Confederate prize court, the title would still remain in claimant and the duty to restore to him would be the same. In *The Lilla* (2 Sprague, 177) it was held that restitution of the vessel should be made to citizens of the United States although she had been condemned by a prize court established by the Confederacy, on the clear ground that a court of the United States could not recognize as valid the act of such a tribunal in case of property of its own citizens.

SALVAGE.

It may be contended that claimant is not entitled to recover without the payment of the salvage provided for under the act of 1800, but claimant could only become liable for this salvage when the vessel was brought into the court according to the provisions of that act. In the

United States *v.* Farragut (22 Wall. 423), this court, in treating of the recapture of vessels of loyal owners at New Orleans, says:

> "If the owners resided on that side of the line of bayonets spoken of in the prize cases (2 Black, 274), which adhered to the Union, then they were not liable to condemnation as prizes, for their owners could have interposed a claim in the prize court, and on payment of salvage their propety would have been restored to them."

This being the right in law of the resident loyal owner, he cannot be in any degree deprived of it by the failure of the captor to libel the vessel in a prize court, where salvage might have been awarded him and the property restored to its loyal owner upon such payment. The duty of the captor is so imperative that only under extraordinary circumstances, such as did not occur in this case, can it be excused. Jacker *v.* Montgomery, 13th How. 498; *Idem.* 18 How. 110; *The Dos Hermanos*, 2 Wheat. 76. By the failure to bring the property into court for adjudication, the captors are and should be foreclosed of their right of salvage. By their own negligence they have precluded their recovery. In violating the rights of the owners they have lost their own.

Measure of Damages.

The findings of the court below show the following to be the value of the use of said vessel from the time when it was fitted out as a gunboat to the time of its destruction, and the value of the boat itself:

Use of vessel from August 1, 1862, to April 17, 1864, 625 days, at $150 per day (Findings VI and VIII, pp. 8 and 9).	$93,750 00
Value of vessel (Finding VII, p. 9).....	30,000 00
Total.....	$123,750 00

Brought forward	$123,750 00
Less two-fifths not owned by claimant (Finding X, p. 14)	49,500 00
Amount due claimant	$74,250 00

In securing vessels for use on the Western rivers at this time it was the policy of the Government to charter them when it was possible, and to impress them when it was not; in either case, however, paying for the use of them so long as they were in the service, and reimbursing their owners when they were lost or destroyed. This is shown by the acts of 1863 and 1864 now embodied, so far as they pertain to this case, in sections 3483 and 3488 R. S. It is true that these statutes refer in terms to military service only, but by analogy they should control the recovery for naval charters and impressments as well, and should therefore control the recovery in this case, whether it be held that the steamer *Eastport* was in the military or naval service of the United States. If this vessel had been taken directly from Hugh Worthington, there is no question but that he would have received pay for its use from the time it was taken until it was destroyed, and would then have received pay for the value of the vessel itself. I think the purpose of the act giving jurisdiction in this case was to give to the heir the same rights as the said Worthington would have had if the vessel had been taken from him directly. It is, therefore, respectfully submitted that this judgment should be reversed and the court below directed to render a judgment in favor of the claimant for the sum of $74,250.

JOHN C. FAY,
Attorney for Appellant.